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Supreme Court of the United States

October Term, 1972

No. 71-1119

INDIANA EMPLOYMENT SECURITY DIVISION, *et al.*,
Appellants,

v.

ESSIE B. BURNEY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA

MOTION BY THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) hereby respectfully moves for leave to file a brief *amicus* in the instant case in support of the position of the Appellees, as provided for in Rule 42 of the Rules of this Court. The consent of counsel for the Appellees has been obtained. Counsel for the Appellants have refused their consent.

INTEREST OF THE AFL-CIO

The AFL-CIO is a federation of 115 national and international unions having a total membership of approximately 13,500,000 working men and women.

Unemployment compensation was designed to protect "industrial workers ordinarily employed." Report To The

President Of The Committee On Economic Security, 13 (1935). That, of course, is an accurate description of the great majority of the members of the Federation's affiliates. The fact that the instant case promises to have a substantial impact on the manner in which unemployment compensation is administered, is, therefore, more than sufficient cause for the AFL-CIO to be vitally concerned as to its outcome. But in this instance the practical importance of the question does not exhaust organized labor's interest in the proceeding. For Indiana's summary suspension of benefits procedure is not based on a valid neutral principle—it is based on the principle that the entire costs of litigation delay incident to the resolution of a disputed question of continued eligibility for benefits shall be borne by the unemployed. Thus, it discriminates against workers, as a class, thereby distorting the basic protective purposes of the unemployment compensation law. This being so, the Federation's interest in presenting its views to this Court is self-evident.

THE ISSUE TO BE COVERED IN THE AFL-CIO'S BRIEF AMICUS

The Appellees have structured their argument in a manner which creates a dichotomy between the statutory, and Due Process clause, arguments presented, and which places primary emphasis on the latter. It is our view that this case turns on the statutory questions involved and that the cases delineating the content of due process are principally relevant only insofar as they provide the context for ascertaining Congress's intent in including § 503 (a)(3), which requires the States to provide "fair hearings" to unem-

ployment compensation recipients, in the Social Security Act, 42 U.S.C. § 503 (a)(3). The argument developed in the accompanying brief *amicus* reflects this orientation.

CONCLUSION

For the above-stated reasons, we respectfully urge the Court to grant this motion to file the accompanying brief *amicus* in the instant case in support of the position of the Appellees.

Respectfully submitted,

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September, 1972

Supreme Court of the United States

October Term, 1972

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INDIANA EMPLOYMENT SECURITY DIVISION, *et al.*,
Appellants,

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ESSIE B. BURNEY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

This *amicus* brief is filed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), contingent upon the Court's granting the foregoing motion for leave to file a brief as *amicus curiae.*

The interest of the AFL-CIO is set out on pp. iii-iv of the foregoing motion for leave to file a brief as *amicus curiae.*

ARGUMENT

1. The instant case involves the rights of workers "who have been or will be determined by [a State] to be eligible for unemployment compensation benefits, and who have had or will have such benefits terminated, withheld, suspended, or reduced without a prior, due process hearing." J.S. A-9. In other words, it involves the rights of recipients of unemployment compensation who have been found initially eligible for benefits pursuant to a procedure exactly parallel to

that followed by California and described in this Court's opinion in *California Human Resources Dept.* v. *Java*, 402 U.S. 121. Compare J.S. A-2, A-6—A-7 with 402 U.S. at 126-128. This "initial determination of an employee's status as an insured worker and the deputy or referee's initial determination of eligibility" is, as the District Court found, "the critical point in the Indiana procedure" (J.S. A-7) for administering unemployment compensation. Compare *Java*, 402 U.S. at 127-128.

Two interrelated preliminary points are therefore plain. First, contrary to Indiana's contention (Ind. Br. p. 13), this case has nothing to do with the rights of claimants who have not been found initially eligible. The Appellees do not argue, and neither do we, that those who have not established their initial eligibility are entitled to any particular type of a hearing, or to the payment of compensation while the State is considering their case. The range of the State's powers in screening those it will place on the unemployment compensation rolls is not at issue.

Second, those who have been found initially eligible to receive unemployment compensation, like those who have been found initially eligible to receive welfare, are subject to certain conditions subsequent which qualify their statutory entitlement to continued benefits. Both welfare and unemployment compensation recipients must perform regular affirmative duties to maintain their continued eligibility. Unemployment compensation recipients must, for example, seek work, be available for work and report any change in work status or income.[1] All able bodied welfare

[1] Ind. Ann. Stat. § 52-1538B (Burns 1964 Repl. 1972 Supp.) § 52-1540 (Burns 1964 Repl.).

recipients, except those having children under the age of six, are required to register for work, seek and accept work, or, if unsuited for work, undergo job training, and report any change in status or income.[2] In both programs, beneficiaries begin receiving regular benefits after an initial eligibility investigation, and thereafter are required to make periodic reports concerning their continued eligibility. An unemployment compensation recipient who has established his status as an "insured worker"[3] is placed in a "continued claim" category and must report for an "interview" to review his status once every five or ten weeks.[4] Welfare recipients also undergo periodic eligibility reviews.[5]

Thus the States have adopted administrative interview procedures which admittedly do not meet the essential rudiments of due process (App. 26 ¶ 16) to ascertain whether the specified conditions of continued eligibility are met by those receiving benefits. There is no challenge here to the States right to take this step, and on the basis of an adverse administrative determination, to terminate benefits immediately where the recipient accepts that determination.

What is at stake is whether the States must grant an unemployment compensation recipient, who maintains that he has met the statutory conditions for continued benefits,

[2] Ind. Ann. Stat. § 52-1241a (Burns 1964 Repl., 1972 Supp.); 4 Ind. Admin. Rules & Regs. § 52-1244-2 (Burns 1967 Repl., 1972 Supp.); Ind. Pubic Assistance Manual, Chap. 111-C-15, IV-B-21, XI-A-1 and 2.

[3] Ind. Ann. Stat. § 52-1526X (Burns, 1964 Repl.).

[4] Ind. Employment Security Division, Unemployment Claims Manual §§ 13720-13732.

[5] Ind. Public Assistance Manual, Chapter XI-A-1 and 2.

and who requests an opportunity to demonstrate his continued eligibility, a "full evidentiary" hearing (Ind. Br. p. 16) *prior* to any deprivation of benefits. Thus the question here is precisely the question decided in favor of welfare recipients in *Goldberg* v. *Kelly,* 397 U.S. 254.[6] It only beclouds analysis to state, as Indiana does, that the decision to terminate the benefits of one already on the unemployment rolls is really an "initial [eligibility] determination" (Ind. Br. p. 13) since "eligibility is determined on a week-by-week basis" (Ind. Br. p. 7), and that the situation of the Appellees here is comparable to that faced by individuals who have never demonstrated their initial eligibility. For this formula of words can not disguise the fact that these determinations deal with precisely the same type of continued eligibility issues which this Court in *Goldberg* (397 U.S. at 266-271) stated should be determined in a "full evidentiary" hearing. As the court below properly found "the concept of when benefits are due under the Social Security Act does not change from week to week after a claimant has been found [initially] eligible." J.S. A-9. Claimants who have already established their status as an "insured worker" have made out a *prima facie* case that they have a statutory entitlement to unemployment compensation. They have therefore established a sufficient probability that "they [are], in fact, within the statutory terms of eligibility" to have "a right to a hearing at which they [may] attempt to" demonstrate their continued eligibility. *Board of Regents* v. *Roth,* .....

[6] "The constitutional issue to be decided, therefore, is the narrow one whether the Due Process Clause requires that the recipient be afforded an evidentiary hearing *before* the termination of benefits." 397 U.S. at 260.

U.S. ....., 40 L. W. 5079, 5083. In contrast an individual who claims the right to benefits but has not proved his initial eligibility as an "insured worker" can not be differentiated in any meaningful way from any other individual in the society. His demand for a hearing therefore lacks a proper predicate. It is for this reason that he is not entitled to the same procedural protections due those who have received official recognition of their basic right to benefits.

Additionally, it should be noted that it is common ground that the "fair hearing" provision of the Social Security Act, 42 U.S.C. § 503(a)(3) requires a "full evidentiary" hearing (Ind. Br. p. 16); viz., a hearing "conducted in accordance with procedural safeguards" which meet the "essential requisites of fairness" delineated by the "case law,"[7] before an unemployment compensation recipient can be finally deprived of his statutory entitlement. For this "Court has held that a person receiving welfare bene-

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[7] U.S. Department of Labor Unemployment Insurance Services Office of State Operations, Guide To Unemployment Insurance Benefits Appeals: Principles And Procedures, 2-3 (1970), which states:

> "Hearings must be fair, and they must therefore be conducted in accordance with procedural safeguards. The essential requisites of fairness, although expressed in many ways, include the following elements which have been excerpted from case law: "timely notice to all claimants of every material step in the proceedings; . . . to hear the evidence against him and to know the claims of his opponent; . . . to cross-examine witnesses; . . . that the Decision of the Board shall be governed by and based upon the evidence produced at the hearing. . . ."

See also *Goldberg* v. *Kelly*, 397 U.S. at 266-271.

fits under statutory and administrative standards defining eligibility for them has an interest in continued receipt of those benefits that is safeguarded by procedural due process. Goldberg v. Kelly, 397 U.S. 254." *Roth*, 40 L.W. at 5083. And the " 'property' interests protected by procedural due process" include the full range of "claim[s] of entitlement • • • grounded in [a] statute defining eligibility for them." *Ibid.* "It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined." *Id.* at 5082. Thus as this Court squarely held in *Sherbert* v. *Verner*, 374 U.S. 398, 405, unemployment compensation benefits, no less than welfare[8] or social security[9] benefits "fall within the protection from arbitrary governmental action afforded by the Due Process Clause." And as the Court stated in *Fuentes* v. *Shevin*, ... U.S. ....., 40 L.W. 4692, 4696:

> "For more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard'; • • • Baldwin v. Hale, 68 U.S. 223.
>
> • • •
>
> "The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decisionmaking when it acts to deprive a person of his possessions. The purpose of this requirement is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment—to minimize substantively unfair or mistaken deprivations of property • • •"

[8] *Goldberg* v. *Kelly*, 397 U.S. 254.

[9] *Flemming* v. *Nestor*, 363 U.S. 603.

Thus, this is not a case like *Cafeteria Workers* v. *McElroy*, 367 U.S. 886, where there is a substantial dispute as to whether a hearing is required at all; if litigation delay were not a fact of life there would be no controversy between the parties here. But delay in the resolution, through a "full evidentiary" hearing, of challenges to the right of an individual, already found eligible for unemployment compensation, to continued enjoyment of his statutory entitlement, is the norm. In Indiana, where the average length of time an unemployed worker receives benefits is 11 weeks, during the period January-March, 1972, 63% of those who sought a full hearing did not receive a determination within 11 weeks, and during 1971, 72% did not receive a determination within 11 weeks.[10]

Indiana's response to the fact of delay has been to authorize summary suspension of benefits (J.S. A-7—A-8), thereby placing the full costs of delay on the recipients whose continued entitlement to benefits is questioned. This response, we submit, does not meet the requirements of federal law. The Social Security Act read in conjunction with the Due Process Clause creates an all but unrebuttable presumption, which has not been overcome here, against a procedure pursuant to which a State deprives unemployment compensation recipients, who have been found initially eligible by the State, and who insist that they have complied with the conditions for continued eligibility, of their prop-

[10] Thirty-sixth Annual Report of the Indiana Employment Security Board, Employment Security in Indiana 1971, p. 55 (March 30, 1972); U.S. Dept. of Labor, Manpower Administration, Unemployment Insurance Statistics, Table 17a, p. 12 (March, 1972); U.S. Dept. of Labor, Manpower Administration, Unemployment Insurance Statistics, Table 17 at p. 9 (May, 1972).

erty right in their benefits prior to a finding of ineligibility made in a "full evidentiary" hearing.

2. (a) In providing for a system of unemployment compensation

> "the congressional objective [was to get] money into the pocket of the unemployed worker at the earliest point that is administratively feasible. That is what the Unemployment Insurance program was all about." *Java*, 402 U.S. at 135.

The Congressional aim was to approach, as nearly as was possible, the ideal of making "insurance payments available precisely on the nearest payday following the termination." *Id* at 130. For:

> "The purpose of the Act was to give prompt if only partial replacement of wages to the unemployed, to enable workers 'to tide themselves over, until they get back to their old work or find other employment, without having to resort to relief.' Unemployment benefits provide cash to a newly unemployed worker 'at a time when otherwise he would have nothing to spend,' serving to maintain the recipient at subsistence levels without the necessity of his turning to welfare or private charity. Further, providing for 'security during the period following unemployment' was thought to be a means of assisting a worker to find substantially equivalent employment. • • • Finally, Congress viewed unemployment insurance payments as a means of exerting an influence upon the stabilization of industry. • • • 'Early payment of insurance benefits serves to prevent a decline in the purchasing power of the unemployed, which in turn serves to aid industries producing goods and services.' *Id.* at 132-133, footnotes omitted.

The States are therefore mandated by § 303(a)(1) of the

Act, which requires that state methods of administration must "be reasonably calculated to insure full payment of unemployment compensation when due" to begin "paying compensation to an unemployed worker promptly after an initial determination of eligibility" (*id.* at 133). For this "accomplishes the congressional purposes of avoiding resort to welfare and stabilizing consumer demands; delaying compensation until months have elapsed defeats these purposes." *Ibid.*

But the Indiana procedure challenged here does not provide for the payment of "compensation to an unemployed worker promptly after an initial determination of eligibility" where a disputed question concerning his compliance with the conditions for continued eligibility arises. In such cases payments are summarily suspended pending a "full evidentiary" hearing. When those hearings are held the latest figures show that 49.2% of the decisions are in favor of the claimants.[11] But as noted above, despite the fact that the average time on Indiana's unemployment compensation rolls is 11 weeks, between 63% and 72% of those who request a full hearing must wait over 11 weeks for a decision. To be sure, vindication of the rights of unemployment compensation recipients who are in fact entitled to benefits after "months have elapsed" serves the cause of abstract justice. As this Court squarely recognized in *Java* (402 U.S. at 133), however, a system which normally suspends payments "after an initial determination of eligibility" for a period equal to the average time on the unemployment

[11] U.S. Dept. of Labor, Manpower Administration, Unemployment Insurances Statistics, Table 18, p. 10 (May 1972).

compensation rolls does not "accomplish" the Congressional "purposes" underlying the Act; instead it "defeats" them.[12] Thus summary suspensions of benefits are plainly in contravention of §§ 303(a)(1) and 303(a)(3) of the Act unless it can be shown that no other system of dealing with disputes concerning continued eligibility is "administratively feasible" (*id* at 135).

(b) It is perfectly well settled that in determining the content of procedural regulations such as §§ 303(a)(1) and 303(a)(3) of the Act, the Courts look to the context provided by the decisions elaborating the elementary notions of fair procedure contained in the Due Process Clause, as well as to the language, purpose and legislative history of the statutes in question:

> "Where administrative action has raised serious constitutional problems, the Court has assumed that Congress or the President intended to afford those affected by the action the traditional safeguards of due process. • • • These cases reflect the Court's concern that traditional forms of fair procedure not be restricted by implication or without the most explicit action by the Nation's lawmakers, even in areas where it is possible that the Constitution presents no inhibition." *Greene* v. *McElroy*, 360 U.S. 474, 507-508.

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[12] "It seems clear therefore that the California procedure, which suspends payments for a median period of seven to 10 weeks pending appeal, after an initial determination of eligibility has been made, is not 'reasonably calculated to insure full payment of unemployment compensation when due.'[18]

• • •

"[18] It was uncontested in argument before the District Court that the average period of unemployment in California is approximately nine weeks." 402 U.S. at 133.

And the due process decisions reinforce the conclusion, manifest in the Act itself, that the summary suspension of unemployment compensation benefits where a question of continued eligibility has arisen is presumptively unlawful. The basic constitutional principles regarding the right to a prior hearing where continued enjoyment of a property interest is at stake are set forth in full in *Fuentes,* 40 L.W. at 4696-4697, this Court's most recent statement on the issue:

> "If the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented. At a later hearing, an individual's possessions can be returned to him if it was unfairly or mistakenly taken in the first place. Damages may even be awarded to him for the wrongful deprivation. But no later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred. 'This Court has not . . . embraced the general proposition that a wrong may be done if it can be undone.' Stanley v Illinois, — US —, —.
>
> "This is no new principle of constitutional law. The right to a prior hearing has long been recognized by this Court under the Fourteenth and Fifth Amendments. Although the Court has held that due process tolerates variances in the *form* of a hearing 'appropriate to the nature of the case,' Mullane v Central Hanover Tr. Co., 339 US 306, 313, and 'depending upon the importance of the interests involved and the nature of the subsequent proceedings [if any],' Boddie v Connecticut, 401 US 371, 378, the Court has traditionally insisted that, whatever its form, opportunity for that hearing must be provided before the depriva-

tion at issue takes effect * * *

> 'That the hearing required by due process is subject to waiver, and is not fixed in form does not affect its root requirement that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest, except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event.' Boddie v Conecticut, supra, at 378-379 (emphasis in original).' "

In short the ultimate question here, phrased in the language of *Java,* is whether summary suspension of unemployment compensation benefits, where there is a disputed question of continued eligibility, is the only "administratively feasible" course; and phrased in the language of the due process decisions, it is whether this is an "emergency situation" (*Bell* v. *Burson,* 402 U.S. 535, 543) which "justifies postponing the hearing until after the event" (*Boddie* v. *Connecticut,* 401 U.S. 371, 379). Thus in substance the issue presented is whether the interests of Indiana in a summary procedure substantially outweigh the interests which have led this Court to conclude that prior hearings are the all but invariable norm.

3. No significant governmental interest supports Indiana's summary suspension procedure. First, there can be no doubt that this procedure is not necessary to safeguard the solvency of the unemployment compensation fund. If the claimant prevails at his "full evidentiary" hearing the prompt regular payments already made to him as an eligible beneficiary have achieved the precise aim of the Act.

Java, 402 U.S. at 133. And the position of the claimant is upheld in nearly half of the cases heard (p. 9 *supra*). Moreover, the data available for the last full year of operations, 1971, indicates that the estimated loss resulting from the payments pending a hearing made in the remaining cases would be approximately $204,296 or .06% of the Indiana Fund's $310,220,000 reserve.[13] In 1971, 1474 claimants received an adverse determination after a full hearing.[14] If, their benefits had been paid pending their hearing, and if each of the 1474 claimants had received $45 for 11 weeks,[15] the total overpayment attributable to payments pending a hearing would have been $729,630. However, since Indiana recouped 72% of its overpayments,[16] the total unrecovered amount would have been $204,296.[17]

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[13] Thirty-sixth Annual Report of the Indiana Employment Security Board, Empoyment Security in Indiana, 1971, p. 27 (March 30, 1972).

[14] U.S. Department of Labor, Unemployment Insurance Statistics, Table 18, p. 10 (May, 1972).

[15] $45 is the maximum benefit paid and 11 weeks is the average period on the unemployment compensation rolls.

[16] Indiana Employment Security Board Annual Report, p. 34.

[17] It should be noted that this figure is based on the assumption that Indiana would not avail itself of available methods to limit overpayments other than its summary suspension procedure. If, for example, the State increased the number of Hearing Referees who conduct full hearings, it could markedly reduce the present unreasonably long period required for the issuance of referee's decisions. Administrative costs are reimbursed by the federal government and may not be drawn from the Employment Security Fund, 42 U.S.C. §§ 503(a) and 1103(c) (1). Thus the hiring of additional Referees would have no effect on the amount of money available for the payment of benefits.

Second, the District Court's order requiring Indiana to conduct a full hearing prior to suspension or termination of benefits was entered on October 27, 1971. Pursuant to that order the State still makes administrative determinations as to whether the conditions for continued eligibility have been met. When it concludes that they have not, it affords the recipient the opportunity to have his benefit payments continued if he wishes a "full evidentiary" hearing. Experience demonstrates that this requirement has not added to the State's administrative burdens. Comparing the period January-March 1971 and January-March 1972, there has been an 8% *decrease* (from 829 requests to 764) in the number of claimants seeking a hearing.[18] Moreover, utilizing the same periods of comparison, the percentage of hearings at which the claimants prevail has *increased* since the District Court's order went into effect.[19]

Third, here, as in *Jáva,* summary suspension of benefits can not be justified by invoking the interests of the employers who pay taxes into the Fund. Assuming *arguendo* that the employers interest in the lowest possible tax rate is a legally protected interest (but see *N.L.R.B.* v. *Gullet Gin Co.* 340 U.S. 361), the cost estimates just noted (pp. 12-13 *supra*), are sufficient to demonstrate that providing full

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[18] Compare U.S. Department of Labor, Unemployment Insurance Statistics, Jan.-Mar. 1972, Table 18, p. 10 (May 1972) with U.S. Department of Labor, Unemployment Insurance Statistics, Jan.-March 1971, Table 18, p. 14.

[19] Compare U.S. Department of Labor, Unemployment Insurance Statistics, Jan.-Mar. 1972, Table 18, p. 10 (May 1972) (49.2% success factor) with U.S. Department of Labor, Unemployment Insurance Statistics, Jan.-Mar. 1971, Table 18, p. 14 (June, 1971) (45% success factor).

hearings before the termination of benefits will not cause an increase in the overall tax rate. And, in Indiana, as in California (see *Java*, 402 U.S. at 135-136) the status of the individual employer whose former employee receives an erroneous overpayment pending a hearing is completely safeguarded. The amount of taxes paid by an employer into the Employment Security Fund varies with the number of his former employees who qualify for unemployment benefits. But, should a former employee be found ineligible for benefits at a referee hearing or at any subsequent stage, the employer's account is relieved of all charges.[20] The State, not the employer, bears sole responsibility for recoupment of overpayments. Thus even if an employee receives an overpayment pending an evidentiary hearing, his former employer suffers no monetary loss.

It is plain, therefore, that there is no substance in the contention (Ind. Br. p. 13) that summary suspension is the primary means of protection against unfairness to employers, administrative chaos, and improvident depletion of the Fund which will force tax increases. The sole cost of providing pretermination hearings is a modest marginal rise in overpayments of approximately $204,000 per year or .06% of the Fund's reserves. This loss is of the same order of magnitude as that projected for the procedural reform ordered by this Court in *Java*. There the cost of halting summary suspensions of benefits pending an employer's appeal from a ruling of initial eligibility was approximately $350,000 per year or .03% of the California Fund's re-

[20] Ind. Ann. Stat. § 52-1537(d) (Burns 1964 Repl. 1972 Supp.).

serves.[21] Thus here as in *Java* the State has not shown that the costs of fulfilling Congress's primary goal—"paying compensation to an unemployed worker promptly after an initial determination of eligibility" (*Java* 402 U.S. at 133) — are sufficient to justify delaying compensation "until months have elapsed" (*ibid*).

Equally to the point, the rationale of the due process cases leaves no doubt that costs within this range are not sufficient to create an "emergency situation" (*Bell* v. *Burson*, 402 U.S. at 543) which "justifies postponing the hearing until after the event" (*Boddie* 401 U.S. at 379). In *Goldberg* v. *Kelly*, for example, where the costs of pretermination hearings were at least as great, and probably greater since the possibility of recoupment of erroneous overpayments from "judgment proof" welfare recipients (379 U.S. at 266) is more remote than from employable workers, the Court stated (*ibid*):

> "The interest of the eligible recipient in uninterrupted receipt of public assistance coupled with the State's interest that his payments not be erroneously terminated, clearly outweighs the State's competing concern to prevent any increase in its fiscal and administrative burdens."

And as Mr. Justice White added in *Stanley* v. *Illinois*, 405 U.S. 645, 656.:

> "[O]ne might fairly say of the Bill of Rights in general and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency which may characterize praiseworthy gov-

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[21] Brief for the AFL-CIO as amicus curiae in No. 507, Oct. Term, 1970, p. 8.

ernmental officials no less and perhaps more than mediocre one."

While the costs imposed on the States, and on employers, of a full hearing before the fact are *de minimis*, the costs of Indiana's summary suspension procedure on claimantss are unacceptably high. As noted above (p. 7, *supra*) in almost one case out of two, a summary termination of benefits serves to deprive a claimant, who is in fact eligible, of compensation at the point in time when the benefits will serve their intended purpose—"promptly after an initial determination of eligibility" (*Java*, 402 U.S. at 133). This Court has noted the weight of the burden imposed by such a loss of benefits. In *Nash* v. *Florida Industrial Commission*, 389 U.S. 235, 239, Mr. Justice Black stated that the unemployed are "of modest means," have "heavy responsibilities," and risk "financial ruin" if there is a "severance of [the] sustaining funds" provided by compensation. The available statistical evidence demonstrates that this assessment is entirely correct.

The mean hourly wage of the rank and file worker as of July, 1972 was $3.62 an hour, i.e. approximately $7,000 to $7,500 a year.[22] Typically, that worker is the sole support of family of four.[23] The latest government estimate places a "lower" weekly budget to feed, shelter, clothe and provide

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[22] U.S. Dept. of Labor, Bureau of Labor Statistics, *Employment and Earnings*, Vol. 9, No. 2, p. 80, Table C2 (August, 1972).

[23] There are 39,303,000 families in the United States and 9,136,000 unrelated individuals. The average family has 3.54 members. Statistical Abstract of the United States 1970, p. 35, Table 40. In over 55% of families only one spouse is an income earner, U.S. Dept. of Commerce, Bureau of The Census, *Current Population Reports*, Series P-60, No. 75, p. 55, Table 24 (Dec. 14, 1970).

medical care for such a family at $111 a week.[24] But the median liquid assets of that family, available to meet an emergency which cuts off the flow of income, is $300.[25] The typical industrial worker therefore has funds to tide him over for less than three weeks of unemployment. And that is the period necessary to determine initial eligibility.[26] This means that by the time he is placed on the compensation rolls his funds are likely to be exhausted.

Thus, while there is no "means" test for unemployment compensation, today, as in 1935, for the "industrial workers ordinarily employed" (Report To The President Of The Committee On Economic Security at p. 13), who comprise the bulk of compensation beneficiaries

> "unemployment benefits provide cash to a newly unemployed worker 'at a time when otherwise he would have nothing to spend,' serving to maintain the recipient at subsistence levels without the necessity of his turning to welfare or private charity." *Java,* 402 U.S. at 131-132, footnote omitted.

In short, in the instant case, as in *Sniadach* v. *Family Finance Corp.,* 395 U.S. 337 and *Goldberg* v. *Kelly,* the result of the States' summary procedure is to condemn the party deprived of his statutory entitlement or other property interest "to suffer grievous loss," (*Goldberg* 397 U.S. at 263). The typical unemployment compensation beneficiary occupies a position substantially worse than the

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[24] U.S. Dept. of Labor, Bureau of Labor Statistics, *Autumn 1971 Urban Family Budgets and Geographical Comparative Indexes,* Table A (April 27, 1972).

[25] Katona, *et al.,* Survey of Consumer Finances p. 100, Table 6-3 (1970).

[26] Unemployment Claims Manual § 13130.

driver who lost his license in *Bell* v. *Burson*, 402 U.S. 535, and the consumer whose goods were replevied in *Fuentes*, 40 LW 4692, somewhat worse than the garnished employee in *Sniadach*, and somewhat better than the welfare recipient in *Goldberg* whose benefits were summarily terminated. The consumer's and the driver's flow of income will normally remain unimpaired. The garnisheed employee, in addition to his liquid assets, has a continuing income in the form of a "subsistence allowance" of $25 to $50 to a week. *Snaidach*, 395 U.S. at 338 n. 1. The typical displaced industrial worker has median liquid assets of $300 but no continuing income. And the welfare recipient "lacks [all] independent resources." *Goldberg*, 397 U.S. at 264. But in terms of the applicable legal standard these are distinctions without a difference. For here as in *Snidach* the granting of interim relief "may impose tremendous hardship on wage earners with families to support," it "may as a practical matter drive a wage earning family to the wall" because the money available will "generally be insufficient to support [the unemployed worker] for any one week," (395 U.S. at 340, 241-342). Thus in the instant case no less than in *Goldberg* "termination of [benefits] pending resolution of a controversy over eligibility may deprive an *eligible* recipient of the very means by which to live while he waits," (397 U.S. at 264, this Court's emphasis).

The sum of the matter is this: Indiana's summary suspension procedure contravenes the basic purpose of the unemployment compensation system—the "pay[ment of] compensation to an unemployed worker promptly after an initial determination of eligibility" (*Java*, 402 U.S. at 133.)"—and does so without serving an overriding com-

peting interest of the State. The court below therefore acted in conformity with this Court's decision in *Java*, and with the line of due process cases culminating in *Fuentes*, in requiring Indiana to grant a pre-termination "full evidentiary" hearing to an unemployment compensation recipient who has been found initially eligible for benefits and who maintains that he has met the statutory conditions for continued eligibility.

CONCLUSION

For the above stated reasons the judgment below should be affirmed.

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